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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1157

ROBERT A. HELTON, Administrator of the Estate of WALTER J. PROBERT, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago & North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago & North Western Railway Company),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPPORTING BRIEF.

CHARLES C. SPENCER,
HARRY A. BARNHARDT and
RICHARD M. SPENCER,
Counsel for Petitioner.

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May It Please the Court:

Robert A. Helton, administrator of the estate of Walter J. Probert, deceased, respectfully shows to this Honorable Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit based on the Federal Employers Liability Act, filed and tried in the Superior Court of Cook County, Illinois. Walter J. Probert (Petitioner's intestate) was employed in interstate transportation on the Chicago & North Western Railroad. In the night-time, on February 3, 1938, he was riding on top of a bad order box car, and was endeavoring, as his duty required him to do, to set out the bad order car on a short house track. He was giving signals, by a lighted fusee, to the fireman and engineer, whose respective duties were to relay and obey the signals. This they negligently failed to do, with the result that the car on which Probert was riding ran off the end of the house track, into and against a frozen embankment of earth, just beyond the end of the house track. The car was overturned and Probert was killed.

A verdict of a jury was rendered for petitioner for $13,500, on which judgment was entered by the trial court (Rec. 7). On appeal of respondent to the Appellate Court of Illinois, an intermediate court of review, that court reversed the judgment, without remanding the cause for a new trial (Rec. 167) on the ground that there was no evidence of negligence to submit to the jury (Rec. 182). Petitioner filed a petition for leave to appeal to the Supreme Court of Illinois, and that Court denied the petition on January 20, 1942 (Rec. 171). This petition for certiorari follows.

The record having been printed for the use of the courts below, we are filing with this petition for certiorari, a copy of the records of the trial court and the Appellate and Supreme Courts of Illinois, duly certified by the Clerk of the Supreme Court of Illinois (Rec. 171-2), and also

we furnish herewith 10 copies of the record as printed below, together with 10 printed additions showing the proceedings in the Supreme Court of Illinois and the opinion of the Appellate Court of Illinois (Rec. 169-185), in accordance with Rule 38, paragraph 7, of this Court. The proceedings in the Appellate Court, other than its opinion, are shown in the record printed for use in the court below (Rec. 167, 168).

In this petition we refer to the printed record filed below, and refiled here, and to the additions printed for this Court as (Rec. ....).

A BRIEF OUTLINE OF THE FACTS.

The freight train in question, consisted of 41 cars, and was going from Milwaukee, Wisconsin, to Chicago, Illinois, a distance of about 80 miles. Waukegan is a station about midway between Milwaukee and Chicago, and Lake Bluff, where Probert was killed, is a station about 5 miles south of Waukegan (Rec. 82). At the place in question the Chicago and North Western Railway runs north and south, and contrary to the general practice, runs its trains on the left-hand track, so that its northbound track is on the west and its southbound track is on the east.

This train was operated by a conductor, rear brakeman, engineer, fireman, and Probert, the head brakeman. The head brakeman, engineer and fireman were in the engine and the conductor and rear brakeman were at the rear of the train.

On the southerly trip from Milwaukee to Chicago, at Waukegan, Grogan, the conductor, and the rear brakeman, Foley, discovered a bad order car and, without any consultation with a train dispatcher, or with other members

of the crew of the train involved, the conductor, as was his duty, and would have been the duty of any other man in charge of the movements of the train, immediately took steps to set out the bad order car on one of the tracks at Waukegan (Rec. 126).

This bad order car was the 8th from the rear of the train and the 34th from the front. It had an air leak underneath the car, and as Grogan testified, was of "sufficient character, to justify me, as I thought, in setting it out at Waukegan." The angle cocks on the car were closed and the air was "bled", which made "the brakes useless on the car; would deprive that car of the air braking power." (Rec. 126)

After the train had been cut immediately behind the bad order car, through a misunderstanding of signals, the engine with the 34 cars attached thereto proceeded on south leaving the balance of the train at Waukegan (Rec. 127). The conductor telephoned the dispatcher at Chicago from Waukegan and told him that part of his train had been left there (Rec. 128). At Lake Bluff, where there was an interlocking plant, the forward end of the train was stopped by the towerman, and he gave to Probert the following message: "Chicago, Illinois, February 3, 1938: to engineer: You left your rear part of train at Waukegan. Set out part of train you now have on east passing track at Lake Bluff and return at Waukegan on westward track for balance of your train. O.A.G." (Rec. 66).

At Lake Bluff running off of the east main track were two switch tracks running north, one known as the passing track, capable of holding approximately 60 freight cars, and the other known as the house track, holding only about 13 cars.

The passing track was used sometimes for the purpose of holding a train while another train on the main line passed it, but not always used for that purpose. The house track was used for setting out cars which were designed to be left for a time at the Lake Bluff station either for loading, unloading or other purposes (Rec. 87).

Two ordinary railroad ties were laid across the rails of this track at its north end and immediately north of that end was a dirt embankment which at the time of this accident was frozen solid (Rec. 18).

After receiving the message from the dispatcher, Probert, the engineer and the fireman read it and Probert then left the engine for the purpose of putting the train on the passing track. Probert waited on the ground while the train proceeded southward a sufficient distance to back into the passing track. While in this position and when the last car on the train was south of the points of the house track switch, Probert stopped the train by signalling the engineer (Rec. 147).

At this point in the movement the evidence shows that Probert discovered, or for the first time learned that the bad order car was in the train, being the last or northern most car of the 34. Probert then having learned of the presence of the bad order car without brakes, which made it a hazard, or danger, to the whole train, proceeded, as it was his duty to do, to set out the bad order car, without brakes working on it, on to the house track. And it was while Probert was engaged in this act, that because of the failure of the fireman to relay, and the engineer to obey, the signals which were given by Probert to the engineer through the fireman, and because of this negligence of the engineer and fireman, the bad order car, upon which Probert was then riding, ran off of the north end of the house track and turned over and Probert was killed (Rec. 148, 143).